Supreme Court, U. S.
FILED
DEC 27 1976
MICHAEL RODAK, JR., CLERK

No. 76-459

In the Supreme Court of the United States

OCTOBER TERM, 1976

COMMUNICATIONS WORKERS OF AMERICA, AN UNINCORPORATED LABOR ASSOCIATION,

Plaintiff-Appellant,

v.

STATE OF COLORADO, DEPARTMENT OF LABOR AND EMPLOYMENT, DIVISION OF LABOR, JAMES M. SHAFFER, EXECUTIVE DIRECTOR, STATE OF COLORADO, DEPARTMENT OF LABOR AND EMPLOYMENT, DIVISION OF LABOR, INDUSTRIAL COMMISSION OF THE STATE OF COLORADO, HENRY C. KIMBROUGH, IN HIS CAPACITY AS A MEMBER OF THE INDUSTRIAL COMMISSION OF THE STATE OF COLORADO, ALBERT F. MANGAN, IN HIS CAPACITY AS A MEMBER OF THE INDUSTRIAL COMMISSION OF THE STATE OF COLORADO, AND KENNETH C. RUSSELL IN HIS CAPACITY AS A MEMBER OF THE INDUSTRIAL COMMISSION OF THE STATE OF COLORADO,

Defendants-Appellants,

v.

WESTERN ELECTRIC COMPANY, INC., A NEW YORK CORPORATION, AND THE MOUNTAIN STATES TELEPHONE & TELEGRAPH COMPANY, A COLORADO CORPORATION,

Defendants-Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF COLORADO

BRIEF IN OPPOSITION TO MOTIONS TO DISMISS OR AFFIRM

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APPEAL FROM THE SUPREME COURT OF THE STATE OF COLORADO

BRIEF IN OPPOSITION TO MOTIONS TO DISMISS OR AFFIRM

The Appellant, Communications Workers of America [hereinafter, CWA], respectfully submits the following Brief

in Opposition to Motions to Dismiss or Affirm filed herein by Appellees The Mountain States Telephone and Telegraph Company [hereinafter, Mountain States] and Western Electric Company, Inc. [hereinafter, Western Electric].[1]

ARGUMENT

Mountain States' and Western Electric's Motions to Dismiss or Affirm are substantially identical in their arguments and reasoning.[2] In sum, Mountain States and Western Electric argue that the issues presented in CWA's Jurisdictional Statement are not "ripe" for review and that such issues, even if ripe for review, do not present a substantial federal question. CWA submits that both of these contentions are manifestly without merit.

I. THE ISSUES PRESENTED IN CWA'S JURISDICTIONAL STATEMENT ARE RIPE FOR REVIEW BECAUSE THE WITHIN APPEAL IS FROM A FINAL JUDGMENT OF THE COLORADO SUPREME COURT DECLARING INVALID AND UNENFORCEABLE IN COLORADO THE UNION SECURITY PROVISIONS AT ISSUE.

Mountain States' and Western Electric's arguments concerning the ripeness of the Colorado Supreme Court's decision

[1]A separate appeal in this matter has been filed by the several State of Colorado Defendants, and No. 76-478 has been assigned to that appeal. The within Brief in Opposition to Motions to Dismiss or Affirm pertains only to Mountain States' and Western Electric's Motions to Dismiss or Affirm as such Motions relate to No. 76-459.

[2]Mountain States' Motion to Dismiss or Affirm shall, in abbreviated form, be referred to as "M.S. Motion;" Western Electric's Motion to Dismiss or Affirm shall, in abbreviated form, be referred to as "W.E. Motion." CWA's Jurisdictional Statement shall, in abbreviated form, be referred to as "CWA Jur. St." References to the Appendix herein shall be to CWA's Appendix to Jurisdictional Statement.

herein for review focus on CWA's and the State of Colorado's concern that such decision will result in substantial fragmentation of federally recognized bargaining units for the purpose of entering into "all-union agreements" and participating in "all-union" referenda. Thus, Western Electric states that "[t]he very limited nature and purpose of the application of the two election procedure, as expressed by the court below, demonstrate that such an *evaluation at this stage is untimely* on the dual grounds that the controversy will not be 'ripe' until the responsible state agency devises a procedure for implementing the Court's decision so as to provide a specific factual context for evaluating the effects of the procedure, . . . and so as to provide the opportunity to *avoid* a constitutional determination of Federal supremacy by staying application of the process in a manner that avoids any possibility of Federal-State conflict." [W.E. Motion at 15; emphasis in original]; see also, M.S. Motion at 7. CWA suggests that such an analysis misapprehends both the Colorado Supreme Court's reasoning and the legal effect of its holding.

The Colorado Supreme Court has held herein that the union security provisions in seven distinct collective bargaining agreements are unenforceable because of 1973 C.R.S. §8-3-108(1)(c).[3] Specifically, the Colorado Supreme Court held:

> "All of the bargaining units involved in this appeal have been recognized or certified by the National Labor Relations Board, and no evidence suggests that any of them were established by a secret ballot election pursuant to §[8-3-104(4)]. In our view, a secret ballot election, as described by §[8-3-104(4)], is the exclusive method by which a collective bargaining unit subject to the 'all-union'

[3]All references to the Colorado Revised Statutes shall be to Colorado Revised Statutes 1973.

referendum provisions of §[8-3-108(1)(c)] may be recognized. Correlatively, we hold that a collective bargaining unit, as defined by §[8-3-104(4)], is a condition precedent to any labor organization's right to enter into an all-union agreement with an employer under Colorado law. Inasmuch as no secret ballot election was conducted for the purpose of establishing a collective bargaining unit authorized to enter into an all-union agreement with Mountain States and Western Electric, C.W.A. is not entitled to the enforcement of the all-union agreement provisions which are, in our opinion, invalid. Even if such an election had been held and an appropriately authorized collective bargaining unit had been established, the union security provisions here in issue would be invalid and unenforceable because of the lack of employee approval through an all-union referendum. [App. B at 23]

• • •

A valid all-union agreement may only be entered after the establishment of a collective bargaining unit in accordance with §[8-3-104(4)]. Having failed to properly define such collective bargaining units prior to entering the agreements here in issue, C.W.A. cannot properly demand that the employers enforce these invalid agreements. [App. B at 29]

• • •

Accordingly, we hold that the disputed clauses of the collective bargaining agreements, between C.W.A. and Mountain States and between C.W.A. and Western Electric are union security clauses subject to state control under the Colorado Labor Peace Act. As enacted, the clauses were invalid because they were not approved through an all-union referendum by an appropriately designated employee group. C.W.A. may not rely on these

clauses to effectuate a discharge of an employee refusing to comply with the terms thereof. Mountain States and Western Electric lawfully refused C.W.A.'s demand that the employees be discharged." [App. B at 31]

Therefore, if any single aspect of this controversy is clear, it is that the union security provisions at issue may not, at this time, be lawfully enforced in the State of Colorado. It is equally clear from the above that the reason for such unenforceability is CWA's failure (1) to have "collective bargaining units" appropriately designated pursuant to §8-3-104(4) *prior* to entering into the union security provisions at issue and (2) to have "all-union" referenda conducted in such "collective bargaining units" pursuant to §8-3-108(1)(c). Further, it cannot be denied that the Colorado Supreme Court's decision herein definitively determined the rights and liabilities of CWA, Mountain States and Western Electric vis-a-vis the union security provisions at issue. Such is the purpose of a declaratory judgment under Colorado law, and such judgment is final in nature.[4]

The federal questions arising from the Colorado Supreme Court's decision are carefully catalogued in CWA's Jurisdictional Statement.[5] CWA's challenge to the validity of §8-3-108(1)(c) is based on its contention that (1) it is unconstitutional for the State of Colorado to require all or a portion of a federally recognized bargaining unit to constitute itself as a "collective bargaining unit" as a condition precedent to the right to enter into a valid union security provision; (2) it is unconstitutional for the State of Colorado to require all or a portion of a federally recognized bargaining unit to constitute

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[4]See, §13-51-104; Colo.R.Civ.P. 57(a); App. B at 4. If declaratory relief will not terminate the controversy, a Colorado court may refuse to enter a declaratory judgment. See, §13-51-111; Colo.R.Civ.P.57(f).
[5]CWA Jur. St. at 3-4.

itself as a "collective bargaining unit" as a condition precedent to the conduct of an "all-union" referendum; and (3) it is unconstitutional for the State of Colorado to require the conduct of an "all-union" referendum as a condition precedent to the enforcement of a union security provision. *None* of these issues involves controverted issues of fact, and *none* of these issues turns on subsequent administrative proceedings. Moreover, the requirements for a valid union security provision under the Colorado Labor Peace Act [hereinafter, Labor Peace Act], as construed by the Colorado Supreme Court, are not "hypothetical" or "speculative." These requirements are, rather, clear and unmistakable.[6]

Mountain States' and Western Electric's authority for their "ripeness" position is, on its face, totally inapposite. The instant appeal neither deals with a state statute either wholly or partially unconstrued[7] nor involves a hypothetical question of law.[8] Nor is the instant appeal from proceedings in which legal rights and relationships have not finally been established. Accord, *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 242

[6]As noted above, Mountain States' and Western Electric's "ripeness" argument is based upon their contention that fears concerning the fragmentation of federally recognized bargaining units through "collective bargaining unit" determinations are, presently, mere speculation. While CWA believes, as does the State of Colorado, such fragmentation is inevitable under the Labor Peace Act, even if, *arguendo*, fragmentation were not possible, the necessity of "collective bargaining unit" status and the necessity of an "all-union" referendum remain as conditions precedent to an enforceable union security provision. These latter requirements are, of course, the focus of CWA's appeal.

[7]Compare, *Alabama State Fed. of Labor v. McAdory*, 325 U.S. 450, 459-60 (1945); *Rescue Army v. Municipal Court*, 331 U.S. 549, 573-74 (1947).

[8]Compare, *Alabama State Fed. of Labor v. McAdory*, *supra* at 460, 462-63, 465-66, 467-69; *Electric Bond & Share Co. v. Securities & Exch. Comm'n*, 303 U.S. 419, 443 (1938); *Allen-Bradley Local 1111 v. Wisconsin Emp. Rel. Bd.*, 315 U.S. 740, 746-47 (1942); *Public Service Comm'n v. Wycoff Co., Inc.*, 344 U.S. 237, 242-45 (1952); *Wheeler v. Barrera*, 417 U.S. 402, 426-27 (1974).

(1937); *LaCrosse Tel. Corp. v. Wisconsin Emp. Rel. Bd.*, 336 U.S. 18, 24 (1949). CWA submits, therefore, that Mountain States' and Western Electric's "ripeness" contentions are utterly without merit.[9]

II. THE QUESTIONS PRESENTED FOR REVIEW BY CWA ARE OF A SUBSTANTIAL FEDERAL NATURE AND WARRANT PLENARY REVIEW BY THE COURT.

CWA will not repeat the analysis contained in its Jurisdictional Statement of the substantial nature of the federal questions herein. It will, however, address certain contentions of Mountain States and Western Electric in this regard.

Mountain States apparently concedes that a "collective bargaining unit" election is a condition precedent to the right to enter into a valid union security agreement in Colorado. See, M.S. Motion at 16. Western Electric, in contrast, states that the only purpose of "collective bargaining unit" certification is to delimit the appropriate unit in which to conduct an "all-union" referendum. See, W.E. Motion at 6, 22. Western Electric also states that "collective bargaining unit" certification would be effected prior to execution of a collective bar-

[9]Contrary to Western Electric's contention at 5 and 19-20 of its Motion to Dismiss or Affirm, CWA expressly noted before the Colorado District Court in its Opening Brief the apparent inapplicability of the term "collective bargaining unit" to interstate or multi-state employee units, stating that it could not seriously be contended that a multi-state bargaining unit is subject to the administration and control of the State of Colorado in connection with union security. More significantly, however, the Colorado Supreme Court decision herein has definitively construed §8-3-108(1)(c) and has found the union security provisions in question unenforceable because, *inter alia*, all or a portion of the Colorado employees in the federally recognized bargaining units involved did not, prior to negotiation of the disputed union security provisions, constitute themselves as "collective bargaining units."

gaining agreement containing a union security provision but after negotiation thereof. [W.E. Motion at 22, 25] Both deny that "collective bargaining unit" certification is in any fashion inconsistent with §9 rights under the Labor Management Relations Act of 1947, as amended [hereinafter, federal Act], 29 U.S.C. §159. [M.S. Motion at 15; W.E. Motion at 21-22]

CWA would initially reiterate that "collective bargaining unit" certification is not determinative of whether a federally recognized bargaining unit is desirous of approving the prior negotiation and execution of an "all-union" agreement. Such approval is, rather, the function of the "all-union" referendum itself. The "collective bargaining unit" election is, under the Colorado Supreme Court's decision, determinative of whether a particular group of employees has authorized its representative to negotiate, or to attempt negotiation of, a union security provision on its behalf. Without such "collective bargaining unit" certification, admittedly absent in the present case,[10] CWA could not validly enter into the within union security provisions under Colorado law. The requirement of "collective bargaining unit" certification, therefore, directly delimits the authority of CWA to negotiate union security provisions on behalf of those individuals in the federally recognized bargaining units involved in this appeal. Such delimitation of authority is clearly an impermissible intrusion by state law upon federal rights secured under §§7 and 9 of the federal Act, 29 U.S.C. §§157 and 159. Finally, such delimitation of authority is necessarily effected by state regulation prior to the

[10]The State of Colorado stated at 7 of its Jurisidictional Statement that "[p]rior to this decision, the state agency conducted unit certification elections only for those units which were not within the jurisdiction of the National Labor Relations Act. The state did not construe the Act as requiring a state unit certification election, as a prerequisite to an all-union agreement referendum, for units which previously have been certified or recognized by the National Labor Relations Board." See also, App. B at 23.

negotiation *and* execution of the union security provisions involved. *Retail Clerks Local 1625 v. Schermerhorn*, 375 U.S. 96, 105 (1963) [hereinafter, *Schermerhorn* II]. Unless "and" is to be equated with the disjunctive "or," even Western Electric's analysis of the timing of "collective bargaining unit" certification places such regulation outside the scope of a state's authority under §14(b) of the federal Act, 29 U.S.C. §164(b).

Expectedly, both Mountain States and Western Electric argue that *Schermerhorn* II and *Algoma Plywood & Veneer Co. v. Wisconsin Emp. Rel. Bd.*, 336 U.S. 301 (1949), are dispositive of whether the states may, pursuant to §14(b), regulate the enforcement of union security provisions through a method other than total prohibition. While language in *Algoma* can plausibly be construed to support Mountain States' and Western Electric's position,[11] CWA submits that a more proper and accurate interpretation of *Algoma* is that the State of Wisconsin was deemed therein to have the authority to restrain the discharge of an employee in violation of its law. It was in this context that the language so heavily relied upon by Mountain States and Western Electric is cited with approval in *Schermerhorn* II, *supra* at 104-105.

[11]Mountain States and Western Electric rely upon the following in *Algoma:*

> "It is argued, however, that the effect of [§14(b)] is to displace State law which 'regulates' but does not wholly 'prohibit' agreements requiring membership in a labor organization as a condition of employment. But if there could be any doubt that the language of this section means that the Act shall not be construed to authorize any 'application' of a union-security contract, such as discharging an employee, which under the circumstances 'is prohibited' by the state, the legislative history of the section would dispel it. . . ." *Id.* at 313.

CONCLUSION

CWA respectfully requests that Mountain States' and Western Electric's Motions to Dismiss or Affirm be denied in their entirety.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have mailed three copies of the forgeoing BRIEF IN OPPOSITION TO MOTIONS TO DISMISS OR AFFIRM, by depositing same in the United States Mail, postage prepaid this _____ day of _____, 19____, addressed as follows:

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